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No. 97-303

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

HUMANA INC., and
HUMANA HEALTH INSURANCE OF NEVADA, INC.,
Petitioners,

v.

MARY FORSYTH, MARIETTA CADE,
WILLIE ANDREWS, MARY LOU BUEHLER,
HELEN STAVES, RANDOLPH BRATTON,
AND SEARLE AUTO GLASS, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF OF ALLIANCE OF AMERICAN INSURERS, AMERICAN COUNCIL OF LIFE INSURANCE, BLUE CROSS AND BLUE SHIELD ASSOCIATION, HEALTH INSURANCE ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF INDEPENDENT INSURERS, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES AND REINSURANCE ASSOCIATION OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF ALLIANCE OF AMERICAN INSURERS *ET AL.* FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS

Alliance of American Insurers, American Council of Life Insurance, Blue Cross and Blue Shield Association, Health Insurance Association of America, National Association of Independent Insurers, National Association of Mutual Insurance Companies and Reinsurance Association of America hereby move, pursuant to Rule 37 of this Court, for leave to file an *amicus curiae* brief in

support of Petitioners. The motion is necessitated by Respondents' refusal to consent.

The above-named associations are among the principal trade associations for the life, health, and property and casualty insurance industry in the United States. Their collective membership consists of thousands of insurance and reinsurance companies and health plans, ranging from small companies operating in single states to the largest insurers with operations nationwide and abroad. Together, these associations' members underwrite the vast majority of property and casualty and life risks in the United States, and provide a large percentage of the health benefits of groups and individuals throughout the nation.

As stated in the accompanying brief, the resolution of this case is of great significance to all of the *amici* and their members. This Court's interpretation of the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011 *et seq.* (1994), and in particular, the scope and meaning of the phrase "invalidate, impair, or supersede" in the statute, will help resolve a currently uncertain and divisive state of the law in the lower courts. Because the application to the *amici's* members of a federal statute that does not specifically relate to the business of insurance depends on the meaning of "invalidate, impair, or supersede" in the McCarran-Ferguson Act, the Court's interpretation of those terms here may very significantly define the scope of each of the *amici's* member's potential liability under federal law.

Alliance of American Insurers *et al.* believe their brief will provide the Court with relevant legal and factual information not already brought to the Court's attention by the parties, particularly with respect to the broad

significance of the question presented and a proper construction of the McCarran-Ferguson Act.

Respectfully submitted,

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August 6, 1998

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INTERESTS OF AMICI CURIAE

Alliance of American Insurers, American Council of Life Insurance, Blue Cross and Blue Shield Association, Health Insurance Association of America, National Association of Independent Insurers, National Association of Mutual Insurance Companies and Reinsurance Association of America are among the principal associations of life, health, and property and casualty insurers in the United States. Together, their members underwrite the vast majority of property and casualty and life risks in the United States, and provide a large percentage of the health benefits of groups and individuals throughout the nation.

The resolution of this case is of great significance to all of the *amici* and their members. This Court's interpretation of the McCarran-Ferguson Act of 1945, and in particular, the phrase "invalidate, impair, or supersede" will help resolve a currently uncertain and divisive state of the law in the lower courts. Because the application to the *amici's* members of a federal statute, such as RICO, that does not specifically relate to the business of insurance depends on the meaning of "invalidate, impair, or supersede" in the McCarran-Ferguson Act, the Court's interpretation of those terms here may very significantly define the scope of each of the *amici's* member's potential liability under federal law.[1]

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[1] Respondents refused to provide consent to the filing of this brief. Accordingly, *amici* have submitted a motion for leave to file the brief. No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their members made any monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Ninth Circuit in this case fundamentally misconstrued the meaning of "invalidate, impair, or supersede" in the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1012(b) (1994). The McCarran-Ferguson Act does not itself define the terms "invalidate," "impair," and "supersede." Accordingly, those terms should be given their ordinary meaning. *Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995).

Rather than considering the ordinary meaning of the words "invalidate," "impair," and "supersede," in particular, by reference to dictionary definitions, the Ninth Circuit imparted its own chosen definition, interpreting all three words to mean "conflict." The McCarran-Ferguson Act does not use the term "conflict," however, nor does any dictionary of which *amici* are aware define either "invalidate," "impair," or "supersede" to mean "conflict." By reducing those three terms into a single, different meaning – conflict – the Ninth Circuit ignored both Congress' intent and this Court's directives regarding statutory interpretation. *See, e.g., Garcia* v. *United States*, 469 U.S. 70, 73 (1984) ("only the most extraordinary showing of contrary intentions . . . would justify a limitation on the 'plain meaning' of the statutory language").

The Ninth Circuit further failed to follow this Court's repeated directives to look to the provisions of a statute in its *entirety*, and to the statute's object and policy, in order to glean the proper construction of statutory terms. *See, e.g., United States Nat'l Bank of Ore.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) ("In expounding a statute, we must . . . look to the provisions of

the whole law, and to its object and policy."). The object and policy of the McCarran-Ferguson Act, as the Act itself declares, is to ensure that "silence on the part of Congress shall not be construed to impose *any barrier* to the regulation or taxation of [the] business [of insurance] by the several States." 15 U.S.C. § 1011 (emphasis supplied). The Ninth Circuit's narrow interpretation of "invalidate, impair, or supersede" is inconsistent with this purpose.

The Ninth Circuit's narrow interpretation of "invalidate, impair, or supersede" stems from an erroneous theory that the McCarran-Ferguson Act operates under a rule of "inverse conflict preemption." Under this theory, the regulation of insurance by the states is deemed to "preempt" federal law only when there is an "irreconcilable conflict" between state law and federal law. This theory is overly simplistic, ignores the purpose of the McCarran-Ferguson Act, and is at odds with the fundamental principles of federalism that underlie *both* that Act and this Court's jurisprudence on federal preemption. Consistent with these principles, both the McCarran-Ferguson Act and federal preemption doctrine establish a strong presumption against federal statutory interference with state law absent clear congressional intent.

The Ninth Circuit's "inverse conflict preemption" theory perversely *reverses* this presumption, permitting federal laws of general application to interfere with state law *unless* there is an "actual conflict" with state law. Because this theory ignores circumstances when federal law may "invalidate," "impair," or "supersede" state law, such as exist in this case, the Ninth Circuit's approach effectively eviscerates the protection for state law that

Congress *expressly* created the McCarran-Ferguson Act to provide.

The profound effect of the Ninth Circuit's erroneous "inverse conflict preemption" theory is starkly illustrated in this case. Nevada has enacted specific laws to discipline insurer conduct, including prohibitions of fraud. *See* Nev. Rev. Stat. §§ 686A.030, 686A.040 (1997). These statutory prohibitions, as well as the corresponding prohibitions enacted by each of the other 49 states and the District of Columbia, are part of a carefully constructed system of individual state regulation designed to protect insurance policyholders not only from misleading insurer conduct, but also from, among other things, risks to the "solidity of insurers" and to "an adequate and healthy insurance market." *Id.* § 679A.140. Nevada, as well as each of the other states and the District of Columbia, has made distinct policy choices about how best to balance the often-competing interests of insurance policyholders in crafting its laws governing insurers. This balancing of interests, which this Court has recognized is inherent in the legislative process, *see Landgraf* v. *USI Film Products*, 511 U.S. 244, 286 (1994), is necessarily disturbed by the application of federal remedies to the same conduct which the states have chosen to discipline through *different* remedial means. The consequences are particularly grave here: not one state nor the District of Columbia has prescribed penalties for insurer fraud that are as inflexible and Draconian as those mandated by RICO.

The imposition of treble damages on insurers under RICO, which permits no discretionary mitigation to prevent undue harm to a defendant (in contrast to, for example, the imposition of punitive damages), demonstrably "invalidate[s]," "impair[s]," and "supersede[s]" state law

within the meaning of the McCarran-Ferguson Act. As this Court has previously recognized in the context of determining whether state law "stands as an obstacle" to full implementation of a federal statute, "it is not enough to say that the ultimate goal of both federal and state law is [the same]." *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987). An impermissible obstacle may be created if the state law "interferes with the *methods* by which the federal statute was designed to reach this goal." *Id.* Thus, under the Supremacy Clause, "whenever 'two separate remedies are brought to bear on the same activity' " by federal and state law, even complete harmony in the "substantive requirements" of the federal and state laws may not prevent preemption of the latter. *Wisconsin Dep't of Indus., Labor & Human Relations* v. *Gould, Inc.*, 475 U.S. 282, 286 (1986) (citation omitted).

Congress indisputably has the authority to intercede in governing the business of insurance whenever it sees fit. In the McCarran-Ferguson Act, Congress explicitly proscribed the interpretation of its enactments as exercising that authority absent congressional reference to the business of insurance in those enactments. The Ninth Circuit's narrow interpretation of the McCarran-Ferguson Act ignores the intent of Congress to thereby preserve state insurance regulation. Further, the Ninth Circuit's erroneous "inverse conflict preemption" theory finds no support in the language of the McCarran-Ferguson Act, the history of the statute's enactment, or this Court's precedents. Finally, the Ninth Circuit's approach in this case is inconsistent with the fundamental principles of federalism underlying both the McCarran-Ferguson Act and the relevant jurisprudence of this Court. For all these reasons, the decision below should be reversed.

ARGUMENT

I. THE NINTH CIRCUIT ERRED BY UNDULY LIMITING THE TERMS OF THE MCCARRAN-FERGUSON ACT

In the opinion below, the Ninth Circuit relied on its prior decision in *Merchants Home Delivery Service, Inc.* v. *Frank B. Hall & Co.*, 50 F.3d 1486 (9th Cir.), *cert. denied*, 516 U.S. 964 (1995), to find that the application of the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1994 & Supp. I 1995), to practices that constitute the business of insurance is not precluded by the McCarran-Ferguson Act of 1945, 15 U.S.C. § 1011 *et seq.* (1994) ("McCarran"). Appendix to Petition ("App.") at 25a. In a relatively cursory few statements, the court below considered whether the application of RICO would, under McCarran, "invalidate, impair, or supersede" Nevada's legislation prohibiting fraudulent acts in the business of insurance. *See id.* at 24a-25a (citing the Nevada Trade Practices and Frauds; Financing of Premiums Act, Nev. Rev. Stat. § 686A.010 *et seq.* (1997)). The court observed "some symmetry" between RICO and the Nevada statute, noting that "RICO permits an injured plaintiff to recover for fraudulent practices which the Nevada administrative scheme proscribes." *Id.* Reasoning that this "symmetry" does not create a "conflict" between federal and state law, the court held that McCarran is not a bar to the plaintiffs' (Respondents') RICO claims. *Id.*

The Ninth Circuit's reasoning is overly simplistic, ignores the plain meaning of McCarran, and is at odds with the fundamental principles of federalism that underlie both McCarran and this Court's well-established jurisprudence

regarding the relationship between state and federal law. More specifically, the Ninth Circuit's narrow construction of the terms "invalidate," "impair," and "supersede" in McCarran cannot be squared with either congressional intent or this Court's prior interpretations of both McCarran and other statutes.

A. The Phrase "Invalidate, Impair, or Supersede" Does Not Mean "Conflict"

This Court has repeatedly emphasized that " 'the starting point in any case involving the meaning of a statute, is the language of the statute itself.' " *United States Dep't of the Treasury* v. *Fabe*, 508 U.S. 491, 500 (1993) (quoting *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 210 (1979)). The McCarran-Ferguson Act provides, in pertinent part:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance. . . .

15 U.S.C. § 1012(b).

McCarran does not define the terms "invalidate," "impair," and "supersede." Thus, in interpreting the statute, these terms should be given their ordinary meaning. *Asgrow Seed Co.* v. *Winterboer*, 513 U.S. 179, 187 (1995). In ordinary usage, each of these terms means something different than "conflict."

The Oxford English Dictionary, one of the dictionaries most frequently cited by this Court, *see, e.g.*, *Muscarello* v. *United States*, 118 S. Ct. 1911, 1914 (1998),

defines "invalidate," "impair," and "supersede" as follows: ***Invalidate***: "To render invalid; to destroy the validity or strength of (an argument, contract, etc.); to render of no force or effect; *esp.*, to deprive of legal efficacy; to make null and void." ***Impair***: "To make worse, less valuable, or weaker; to lessen injuriously; to damage, injure." ***Supersede***: ". . . To render superfluous or unnecessary; to preclude the necessity of. . . . To make of no effect; to render void, nugatory, or useless; to annul; to override. . . ."[2]

Webster's New International Dictionary, also frequently cited by this Court, *see, e.g.*, *Muscarello*, 118 S. Ct. at 1915; *Rutledge* v. *United States*, 517 U.S. 292, 299 n.10 (1996), defines the three terms as: ***Invalidate***: "to weaken or make valueless: DISCREDIT." ***Impair***: "to make worse: diminish in quantity, value, excellence, or strength: do harm to: DAMAGE, LESSEN." ***Supersede***: ". . . to make obsolete, inferior, or outmoded . . . to make void: ANNUL, OVERRIDE . . . to make superfluous or unnecessary. . . ."[3]

No dictionary, to the *amici's* knowledge, defines "invalidate," "impair," or "supersede" as "conflict."

Congress' choice to use the phrase "invalidate, impair, or supersede" cannot simply be brushed aside in order to justify the facially appealing (but seriously misguided) theory espoused by the Ninth Circuit here and

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2 The Oxford English Dictionary (2d ed. 1989).

3 Webster's Third New International Dictionary of the English Language (1964). *See also* Random House Dictionary of the English Language (2d ed. 1987).

in *Merchants Home* that McCarran operates just like the Supremacy Clause in reverse (the "inverse conflict preemption" theory). Had Congress intended McCarran to preclude the application of general federal laws only in the event of a direct "conflict" between state and federal law, it obviously could – and presumably would – have used the word "conflict" in McCarran. Instead, Congress chose to use three other, distinct terms.

By reducing the terms "invalidate," "impair," and "supersede" into a single, different word –"conflict" – the Ninth Circuit robbed the statutory terms of their ordinary significance and ignored the fact that Congress, by using the disjunctive "or," chose to make *each* of those terms a separate basis for the preservation of exclusive state law under McCarran. This was plainly error under this Court's precedents. *See Garcia* v. *United States*, 469 U.S. 70, 73 (1984) ("the use of the term 'or' indicates an intent to give the [words] their separate, normal meanings" (citing *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 338-39 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.")). *See also Doe* v. *Norwest Bank Minn.*, 107 F.3d 1297, 1308 (8th Cir. 1997) (properly looking to dictionary definition for meaning of "impair" and holding that RICO "impairs" state insurance law within the meaning of McCarran), *reh'g denied*, No. 97-1763 (May 12, 1997).

B. Congress' Stated Intent in Enacting McCarran Precludes a Narrow Interpretation of "Invalidate, Impair, or Supersede"

This Court has repeated " '[o]ver and over' " that " ' "[i]n expounding a statute, [courts] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." ' " *Regions Hosp.* v. *Shalala*, 118 S. Ct. 909, 917 n.5 (1998) (quoting *United States Nat'l Bank of Ore.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (quoting *United States* v. *Heirs of Boisdore*, 8 How. 113, 122, 12 L. Ed. 1009 (1849))). The object and policy of the McCarran-Ferguson Act is to preserve from inadvertent federal interference the delicate and carefully constructed system of insurance regulation devised by the several states. Congress made that purpose very clear at the time it enacted McCarran:

> From its beginning the business of insurance has been regarded as a local matter, to be subject to and regulated by the laws of the several States. . . . There is urgent need for an immediate expression of policy by the Congress . . . so that the several States may know that the Congress desires to protect the continued regulation and taxation of the business of insurance by the several States.

S. Rep. No. 79-20, at 1-2 (1945); H.R. Rep. No. 79-68, at 1-2 (1945).

In *Merchants Home*, the Ninth Circuit began its analysis of McCarran by acknowledging that Congress intended the statute "to allow the states to regulate the

business of insurance free from inadvertent preemption by federal statutes of general applicability." *Merchants Home*, 50 F.3d at 1488-89 (citing *Group Life & Health Ins. Co.* v. *Royal Drug Co.*, 440 U.S. 205, 218 (1979)). However, neither the Ninth Circuit nor any of the other courts that have adopted the erroneous "inverse conflict preemption" theory in applying McCarran probed the statute's purpose sufficiently to consider why each and all of its terms "invalidate," "impair," and "supersede" were deliberately chosen by Congress.

This Court recently had occasion to consider the object and policy of McCarran in *Barnett Bank of Marion County* v. *Nelson*, 517 U.S. 25 (1996). In that case, the Court observed that McCarran "sets forth two mutually reinforcing purposes" by stating that " 'continued regulation and taxation by the several States of the business of insurance is in the public interest,' and that 'silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.' " *Id.* at 39 (quoting 15 U.S.C. § 1011). The latter phrase, the Court observed, reveals Congress' intent that McCarran serve to "protect state regulation primarily against inadvertent federal intrusion – say, through the enactment of a federal statute that describes an affected activity in broad, general terms, of which the insurance business happens to comprise one part." *Id.* RICO, of course, is such a federal statute, and thus its use in cases such as this squarely raises the question whether its application to insurance constitutes an "inadvertent federal intrusion."

Congress plainly recognized in enacting McCarran that, if it wished, it could preempt all state law governing the business of insurance. Indeed, McCarran was

Congress' near-immediate response to this Court's determination in *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), that such preemption was within Congress' Commerce Clause power. *See United States Dep't of Treasury* v. *Fabe*, 508 U.S. 491, 500 (1993) (in reaction to *South-Eastern Underwriters*, Congress "moved quickly to restore the supremacy of the States in the realm of insurance regulation"). McCarran is the expression of Congress' decision to leave state insurance regulation undisturbed by any federal law unless Congress has, in formulating that law, both "focused upon the insurance industry" and deliberately decided in favor of federal interference. *Barnett Bank*, 517 U.S. at 40. At the very least, Congress must make "specific detailed references to the insurance industry in proposed legislation" in order to overcome McCarran's bar on federal interference with state law, thereby guaranteeing "that Congress will have focused upon its insurance-related effects." *Id.* at 41-42.

Of course, this case does not involve the question whether RICO, like the federal banking statute at issue in *Barnett Bank*, "specifically relates to insurance."[4] But it is nevertheless critical in this case to recognize that in enacting McCarran, Congress affirmatively burdened itself with the responsibility to make clear when its own laws

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[4] Plainly, RICO does not specifically relate to insurance. There is not a scintilla of evidence suggesting that Congress ever contemplated the use of RICO to discipline the business of insurance. *Cf.*, *Barnett Bank*, 517 U.S. at 40-42 (finding that the National Bank Act "refers specifically to insurance"). Instead, Congress chose other laws for this purpose when it saw fit, including the criminal statute prohibiting fraud by persons "engaged in the business of insurance whose activities affect interstate commerce." 18 U.S.C. § 1033 (1994).

should be permitted to interfere with state insurance regulation. *See, e.g.*, 91 Cong. Rec. 481 ("Congress did not want . . . to take upon itself the responsibility of interfering with the taxation of insurance or the regulation of insurance by the States") (statement of Sen. Ferguson). Recalling this is key here because, as demonstrated by the divergent opinions of the Ninth, Seventh, and Third Circuits, on the one hand (*see Merchants Home;* 50 F.3d at 1492; *NAACP* v. *Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993); *Sabo* v. *Metropolitan Life Ins. Co*, 137 F.3d 185 (3d Cir.1998), *petition for cert. filed*, 67 U.S.L.W. 3024 (June 29, 1998)), and the Eighth, Sixth, and Fourth Circuits on the other (*see Doe* v. *Norwest Bank, Minn., supra; Kenty* v. *Bank One, Columbus*, 92 F.3d 384 (6th Cir.), *reh'g denied*, No. 93-4211 (Sept. 19, 1996); *Ambrose* v. *Blue Cross & Blue Shield of Va., Inc.*, 95 F.3d 41 (4th Cir. 1996), *aff'g mem.* 891 F. Supp. 1153 (E.D. Va. 1995)), McCarran's "invalidate, impair, or supersede" language is subject to sharply different interpretations. Under this Court's dictates, the proper interpretation of this phrase will take into account the *overall* intent of Congress in enacting McCarran. *See Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974) ("When 'interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature . . . .' " (quoting *Brown* v. *Duchesne*, 19 How. 183, 194, 15 L. Ed. 595 (1857))). As revealed by Congress' statements regarding McCarran and this Court's prior recognition of them, *see, e.g.*, *Fabe*, 508 U.S. at 499, 505, the terms "invalidate," "impair," and "supersede" must be broadly interpreted to protect federal laws from interfering with state regulation of insurance without prior

consideration and deliberation by Congress in favor of such intrusion.

C. The Theory of "Inverse Conflict Preemption" Is at Odds with the Fundamental Principles Underlying This Court's Jurisprudence on Preemption

The genesis of the erroneous decision below is the reasoning of the Seventh Circuit in *American Family*, relied on by the Ninth Circuit in *Merchants Home, see Merchants Home*, 50 F.3d at 1492, that "[t]he McCarran-Ferguson Act is a form of inverse preemption, so principles defining when state remedies conflict with (and so are preempted by) federal law are pertinent in deciding when federal rules 'invalidate, impair, or supersede' state rules." *American Family*, 978 F.2d. at 296. The fundamental flaw in the premise that McCarran prescribes the same rules as federal preemption doctrine, in reverse, is that the *policies* and *purposes* of McCarran militate directly against the application of such "inverse preemption" rules.

As described above, McCarran reflects Congress' deliberate decision to leave the regulation of the business of insurance to the states, undisturbed by any federal law that does not specifically relate to insurance. In enacting McCarran, Congress "clearly put the full weight of its power behind existing and future state legislation to sustain it from any attack under the commerce clause to whatever extent this may be done with the force of that power behind it, subject only to the exceptions expressly provided for." *Prudential Ins. Co.* v. *Benjamin*, 328 U.S. 408, 431 (1946). In taking this action, "Congress must have had full knowledge of the nationwide existence of state systems of regulation and taxation; of the fact that they differ

greatly . . . . [I]ts purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations." *Id.* at 430.

Congress' purpose in enacting McCarran was wholly consistent with the principles of federalism that are at the heart of this Court's jurisprudence on preemption of state law by federal law. What is *not* consistent with *either* Congress' purposes for McCarran *or* this Court's federal preemption jurisprudence is the assumption that the *rules* of federal preemption should apply under McCarran directly in "reverse." Indeed, examined closely, it could hardly seem more perverse than to embrace this assumption, given the resulting intrusion on state authority.

In order to preserve the system of federalism, this Court requires that, in order for a federal law to preempt inconsistent state law, particularly an area historically regulated by the states, it must be clear, either expressly or implicitly, that Congress intended that result. To guard against unintended preemption of state law, the Court has identified three *narrow* circumstances in which such preemption may be found. The first is where Congress has expressly stated its intent to preempt. *E.g., Barnett Bank*, 517 U.S. at 31 (citing *Jones* v. *Rath Packing Co.*, 430 U.S. 519, 525, 530-31 (1977)). Second, congressional intent to preempt may be inferred from a "scheme of federal regulation 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' " *Id.* (quoting *Rice* v. *Santa Fe Elevator Co.*, 331 U.S. 218, 230 (1947)). Finally, state law is preempted to the extent that it is in "irreconcilable conflict" with federal law. *Id.* (citing *Rice* v. *Norman Williams Co.*, 458 U.S. 654, 659 (1982)).

By limiting federal preemption to cases involving only these three *narrow* circumstances, the Court has appropriately ensured that its preemption rules reflect traditional principles of federalism. As the Court has explained:

> Federal statutes impinging upon important state interests "cannot . . . be construed without the regard to the implications of our dual system of government. . . . over . . . local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating [must be] reasonably explicit."

BFP v. *Resolution Trust Corp.*, 511 U.S. 531, 544 (1994) (quoting *Kelly* v. *Robinson*, 479 U.S. 36, 49-50 n.11 (1986) (internal citation omitted)). *See also Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) ("if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.' " (quoting *Will* v. *Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989) (internal citations omitted)); *New York State Dep't of Soc. Servs.* v. *Dublino*, 413 U.S. 405, 413 (1973) (" 'If Congress is authorized in a field' it should manifest its intention clearly . . . . The exercise of federal supremacy is not lightly to be presumed.' " (quoting *Schwartz* v. *Texas*, 344 U.S. 199, 202-03 (1952))).

The federalism principles underlying this Court's preemption jurisprudence are precisely the same principles upon which McCarran is based. Just as this Court has established strict rules to protect state law from inadvertent preemption by federal law under the Supremacy Clause, so

Congress established in McCarran a statutory mandate to guard against inadvertent interference with state laws governing insurance. Theoretically, it may be appealing to analogize the McCarran rule against inadvertent federal interference with the judicial rule against inadvertent federal interference, but it makes *no* sense to apply the analogy *directly in reverse*. More specifically, *reversing* the "irreconcilable conflict" preemption rule under the Supremacy Clause and applying that reversed rule under McCarran eviscerates the protection for state law embedded in this Court's preemption jurisprudence *and* McCarran, because it shifts the presumption away from *preserving* state law to *allowing* federal law to *disrupt* traditional state regulation. If, under McCarran, a general federal law is to apply *unless* there is an "irreconcilable conflict" with state insurance law, the courts will begin their McCarran analyses with the plainly erroneous premise that Congress, in legislating on general matters, intends to regulate the business of insurance. Such a premise simply cannot be squared with McCarran or the principles of federalism the statute reflects.

In short, applying in "reverse" the "irreconcilable conflict" rule employed under the Supremacy Clause strikes at the heart of principles of federalism. It makes a mockery of this Court's jurisprudence. It turns the object and purpose of McCarran on its head.

II. THE NINTH CIRCUIT'S NARROW INTERPRETATION OF MCCARRAN SERIOUSLY THREATENS SOUND INSURANCE REGULATION BY THE SEVERAL STATES

A. State Regulation of the Business of Insurance Is Carefully Designed To Ensure a Sound Industry

The system of insurance regulation with which Congress expressly determined not to interfere when it enacted McCarran involves a carefully calibrated combination of laws designed, above all, to protect policyholder interests. As one court has explained:

> The insurance industry is regulated by the states. A particular insurance company must meet the various industry requirements of its home state, and must satisfy the requirements of all states in which it is qualified to act as an insurer. The state requirements include standards for investments, maintenance of reserves, and accounting practices. The state insurance departments supervise policy forms, agency relationships, and the general financial activities of the companies within their jurisdictions. This regulation is designed to preserve the solvency of the insurance companies for the protection of the policyholders.

Consumer Life Ins. Co. v. *United States*, 524 F.2d 1167, 1171 (Ct. Cl. 1975).

As this case highlights, insurer solvency is not the only interest of policyholders that state insurance regulation

serves to protect. Indeed, the Nevada insurance statute, the state law at issue here, sets forth as among its key purposes not only to "provide adequate standards of solidity of insurers," to "insure that the state has an adequate and healthy insurance market," and to "improve and thereby preserve state regulation of insurance," but also to "prevent misleading, unfair and monopolistic practices in insurance operations." Nev. Rev. Stat. § 679A.140 (1997). The Nevada Trade Practices and Frauds; Financing of Premiums Act specifically proscribes misrepresentations by insurers to ensure such protection. *See id.* at §§ 686A.030, 686A.040. Each of the other 49 states similarly prohibits fraud and each has an unfair trade practices statute that proscribes a wide variety of unfair conduct by insurers. However, the different states have devised distinct methods for enforcing these prohibitions, including through different penalties.

The states' choice of specific remedies for policyholders harmed by insurer misconduct is key to effective state insurance regulation. A state's decision to permit private rights of action against insurers, for example, obviously reflects a particular policy determination with respect to competing interests of insureds. Likewise, and most pertinent here, individual states determine what types of penalties to authorize based on their assessments of how best to discipline insurers while at the same time not endangering insurers' financial health. The balance struck by state legislatures in this regard reflects precisely the type of compromise that this Court has previously recognized is frequently necessary in promulgating legislation. *See, e.g.*, *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 286 (1994) ("Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most

effectively pursue the main goal."). Tellingly, not one of the states, in deciding how best to prevent fraudulent conduct by insurers, has prescribed remedies as inflexible and Draconian as those mandated by RICO.[5]

One example of the states' special means of disciplining insurers is the use of "market conduct" examinations. State insurance departments regularly undertake these examinations to probe a variety of underwriting, marketing, and claims settlement practices. The examinations culminate in the production of formal reports setting forth the regulators' findings and identifying any failures to conform to state statutory or regulatory mandates. Depending on the circumstances and the severity of nonconforming conduct, an insurer found to be out of compliance may be subject to penalties, required to enter into a consent decree, or otherwise be ordered to take corrective action.

A recent example of a novel use of the market conduct examination process and the cooperation of state insurance regulators in settling policyholder claims of fraud is the settlement approved by the Third Circuit in *In Re Prudential Insurance Co. American Sales Practice Litigation Agent Actions*, Nos. 97-5155, 97-5156, 97-5217, 97-5312, 1998 WL 409156 (3d Cir. Jan. 23, 1998). That case involved a nationwide class action alleging deceptive

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5 The states' determination of proper penalties for insurer fraud may reflect, among other things, considerations regarding optimal damages for deterrence purposes. *See, e.g.*, A. Mitchell Polinski and Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 *Harv. L. Rev.* 869 (1998) (analyzing the costs and benefits to society of various levels of punitive damages imposed on corporate defendants).

sales practices throughout all of the 50 states and the District of Columbia. At the outset of the case, the New Jersey Insurance Commissioner initiated the organization of a group of insurance regulators from the several states, in which 30 states and jurisdictions elected to participate. The group's work culminated in a report (Report of the Multi-State Life Insurance Task Force and Multi-State Market Conduct Examination of the Prudential Insurance Company of America) that recommended a remediation plan, developed with Prudential's input and cooperation, for settlement of the nationwide claims. *Id.* at *2-*3.

The state regulators' role in the *Prudential* case exemplifies the importance to the states of policing insurer conduct in a manner that appropriately accounts for policyholders' interests in the ongoing solvency of insurers and at the same time ensures adequate discipline of allegedly unlawful insurer conduct. The application of RICO, whose treble damage awards provide for no flexibility, mitigation, or waiver, affords no opportunity for the balancing of interests that state insurance regulation provides. Indeed, courts adjudicating RICO claims do not even have the discretion afforded to courts imposing *punitive* damage awards to consider whether mitigation may be warranted to prevent excessive financial harm to the defendant. *See, e.g.*, *Cullen* v. *Margiotta*, 811 F.2d 698, 713 (2d Cir.) (RICO "requires" that the successful plaintiff be awarded treble damages), *cert. denied*, 483 U.S. 1021 (1987); *Rowlett* v. *Anheuser-Busch, Inc.*, 832 F.2d 194, 207 (1st Cir. 1987) (factors to be considered in awarding punitive damages include the "solvency of the guilty party"). As discussed further below, the application of RICO in a case such as this, in which Nevada has specifically chosen to punish insurer fraud in a different manner than RICO mandates, "impair[s]" (*i.e.*, "does harm

to," "diminishes in value," and "lessens injuriously") state law within the meaning of McCarran by eliminating such discretion.

B. The Imposition of RICO Penalties in This Case and in Others Impairs State Law Within the Meaning of McCarran

The narrow interpretation of McCarran adopted by the Ninth, Seventh and Third Circuits led those courts to the erroneous conclusion that the imposition of treble damages awards under RICO does not "invalidate, impair, or supersede" state law. These courts and the lower courts that have similarly "legislated" that McCarran means "conflict" when it says "invalidate, impair, or supersede" have failed to acknowledge the disruption in state law that the application of RICO penalties to insurers effects, and therefore to recognize why RICO is precisely the type of federal statute Congress declared should *not* apply to insurers in cases such as this.

A brief comparison of RICO to the state laws at issue in this case, *Merchants Home*, and *Sabo* is instructive. Under RICO's provision for a private right of action,

> Any person injured in his business or property by reason of a [pattern of racketeering activity] . . . may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .

18 U.S.C. § 1964(c).

As noted, RICO affords no discretion to the court with respect to treble damages awards. Due to

policyholders', and thus the states', interests in insurers' solvency, this inflexibility of RICO is particularly significant in the insurance context.

The state fraud laws at issue here, in *Merchants Home*, and in *Sabo,* all operate very differently than RICO. Under the Nevada law in this case, if the insurance commissioner believes that anyone has engaged or is engaging in unfair insurance practices, he may issue a statement of charges, accompanied by a notice of hearing. Nev. Rev. Stat. § 686A.160 (1997). Following a hearing, the commissioner is required to issue his order, and if he determines that a violation has occurred, he may order the person to cease and desist from engaging in the unfair practice. *Id.* § 686A.183. The Commissioner may also impose one or both of the following types of penalties:

> (a) If the person knew or reasonably should have known that he was in violation of [the law], payment of an administrative fine of not more than $5,000 for each act or violation, except as to licensed agents, brokers, solicitors and adjusters, the administrative fine must not exceed $500 for each act or violation.
>
> (b) Suspension or revocation of the person's license if he knew or reasonably should have known that he was in violation of [the law].

Id.

Additionally, should the commissioner simply order the person to cease and desist, the commissioner retains the authority to impose the aforementioned penalties in the event that the cease-and-desist order is violated. *See id.*

§ 686A.187. Nevada also provides a private right of action for parties who have been injured by the unfair practices of an insurer, but not for the recovery of treble damages. *Id.* § 686A.310.2.

Similar limitations on penalties apply under the California law at issue in *Merchants Home*. Under the California insurance statute, a person engaging in unfair insurance practices "is liable to the state for a civil penalty to be fixed by the commissioner, not to exceed five thousand ($5,000) for each act." Cal. Ins. Code § 790.035(a) (1993). If the unfair act or practice is determined to be willful, "a civil penalty not to exceed ten thousands dollars ($10,000) for each act" may be applied. *Id.* The determination and the imposition of the penalty is to be decided solely by the insurance commissioner. *Id.* § 790.035(b). Penalties also may be imposed by the commissioner in the event of a violation of any cease-and-desist order the commissioner may impose. *Id.* § 790.07. These penalties too are capped in amount by statute. *See id.*

Likewise, the Pennsylvania unfair practices statute implicated in *Sabo* authorizes the insurance commission to impose fines that are capped at a maximum amount, for knowing violations, of $50,000 in any six-month period. 40 Pa. Cons. Stat. § 1171.11 (1992). Pennsylvania common law further provides a private right of action for fraudulent conduct, but does not authorize treble damages or attorneys' fees. *See Wexco Inc.* v. *IMC, Inc.*, 820 F. Supp. 194, 203-04 (M.D. Pa. 1993). Courts *may* award *up to* treble damages and attorneys' fees in cases brought under the Pennsylvania Consumer Protection Law, 73 Pa. Cons. Stat. § 201-9.2 (1993), but such awards are not

mandatory, as they are under RICO. *See Sewak* v. *Lockhart*, 699 A.2d 755 (Pa. Super. Ct. 1997).

In this case, the district court properly found that, because Nevada "does not prescribe the same harsh penalties which would be available under RICO (*e.g.* treble damages and attorney's fees) for Defendants' violation of unfair trade practices [prohibitions] . . . the McCarran-Ferguson ['invalidate, impair, or supersede'] test is met." App. at 94a-95a (citations omitted). The district court accurately recognized:

> For this Court to allow Plaintiffs to pursue the harsher RICO penalties for behavior which the Nevada Legislature apparently did not deem worthy of such penalties, would be tantamount to allowing Congress to intercede in an area expressly left to the states under the McCarran-Ferguson Act.

Id. at 95a.

In reaching this conclusion, the district court looked to the opinions of other district courts addressing the same issue, including the District Court for the Northern District of California in *LeDuc* v. *Kentucky Central Life Ins. Co.*, 814 F. Supp. 820 (N.D. Cal. 1992), and the District Court for the Middle District of Pennsylvania in *Wexco, Inc.* v. *IMC, supra.* These two opinions merit particular note because they involved the California law at issue in *Merchants Home* and the Pennsylvania law at issue in *Sabo*. Indeed, the district court in *Merchants Home* also cited *LeDuc* in its analysis of the McCarran issue. *See Merchants Home Delivery Serv., Inc.* v. *Reliance Group Holdings*, No. CV-92-6889-WMB, slip op. at 10a (C.D. Cal. July 24, 1993) (finding that the plaintiff's RICO

claims were barred by McCarran because "RICO contains provisions for treble damages and attorneys' fees, neither of which are allowed under the California statutory scheme . . . RICO would not just provide 'parallel' remedies . . . it would supersede the state remedies.").

The opinions in *LeDuc* and *Wexco* set forth the proper analysis of whether RICO "invalidate[s], impair[s], or supersede[s]" state law within the meaning of McCarran. The district courts in these cases and the Sixth, Eighth, and Fourth Circuits in *Kenty, Doe*, and *Ambrose*, respectively, properly construed the operative language in McCarran to mean more than "conflict." As these courts have recognized, the application of RICO in cases where state law authorizes penalties for fraud that differ from the mandatory treble damages and attorneys' fee awards prescribed by RICO "upsets the balance" of regulation of the business of insurance that the states have carefully constructed. This point was aptly made by the court in *Wexco*:

> While Pennsylvania courts have held that . . . common law fraud and deceit actions [are] . . . viable options for aggrieved insureds . . . such common law actions do not reward plaintiffs with the treble damages, costs and attorney fees mandated by RICO. The availability of a federal private action under RICO would not merely nullify the state's chosen regulatory remedies for insurance entity misconduct. Rather, this court believes that the availability of a federal private remedy which would reward successful business plaintiffs, such as the captioned parties, with treble damages, costs and attorney fees *cannot help but upset the balance of relationships between insurance entities and*

> *insureds which are established and regulated* by . . . state laws . . . .

Wexco, 820 F. Supp. at 203-04 (emphasis supplied). *See also LeDuc*, 814 F. Supp. at 829 ("applying RICO would nullify the state's determination of the appropriate remedies for certain conduct and would supersede remedies and regulatory supervision provided by California law. In addition, *California's comprehensive regulatory supervision of insurers' financial conditions would be undermined and disrupted* if agents and policyholders were permitted to assert federal RICO claims based upon allegations of financial nondisclosure.") (emphasis supplied).

This Court, in other contexts, has similarly recognized that the application of remedies inconsistent with those prescribed by the laws of a particular authority may "alter the balance" struck by that authority. As the Court stated with respect to recognizing a right to contribution under federal common law in *Northwest Airlines, Inc.* v. *Transport Workers Union of America,* 451 U.S. 77 (1981), " '[i]t is not our place simply to alter the balance struck by Congress in procedural statutes by . . . enlarging on the remedial provisions contained in these carefully considered statutes.' " *Id.* at 98 (quoting *Mohasco Corp.* v. *Silver*, 447 U.S. 826 (1980)). Likewise, in considering the significance of different remedies in the federal preemption context, the Court has recognized that, in determining whether state law "stands as an obstacle" to full implementation of a federal statute, "it is not enough to say that the ultimate goal of both federal and state law is [the same]." *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987). Such an obstacle may be created if the state law "interferes with the *methods* by which the federal

statute was designed to reach this goal." *Id.* In many cases, permitting state remedies not authorized by a federal statute would invite circumvention of the federal statute, "thereby *upsetting the balance of public and private interests so carefully addressed by the [statute].*" *Id.* (emphasis supplied). *See also Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am.* v. *Lockridge*, 403 U.S. 274, 287 (1971) ("Conflict in technique can be fully as disruptive . . . as conflict in overt policy. . . . The technique of administration and the range and nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system . . . ."); *Wisconsin Dep't of Indus., Labor & Human Relations* v. *Gould Inc.*, 475 U.S. 282, 286 (1986) ("Because 'conflict is imminent' whenever 'two separate remedies are brought to bear on the same activity,' . . . [the Supremacy Clause] prevents States not only from setting forth standards of conduct inconsistent with the substantive requirements of [a federal statute governing certain activity], but also from providing their own regulatory or judicial remedies for conduct prohibited or arguably prohibited by the [federal statute].")

Under this Court's analytical precedents, therefore, the application of RICO in cases such as this demonstrably "impairs" state law. It was these precedents that implicitly informed the opinion of the district court in *Ambrose*, which the Fourth Circuit affirmed without opinion. As the district court in *Ambrose* stated regarding the erroneous "inverse conflict preemption" theory applied by the Ninth, Seventh, and Third Circuits:

> [T]he premise that federal and state laws that prohibit the same conduct "but differ in penalty do not conflict with or displace each other," *American*

> *Family*, 978 F.2d at 297, seems to be based on a very narrow reading of the purpose and function of the state laws at issue. Virtually any state statute includes more than a simple proscription of conduct. It includes the appropriate penalty for that conduct and the appropriate mechanism for enforcing the proscription. A state law that prohibits an act, punishes it with a specific range of fines, makes it the subject of remedial action, and vests enforcement in a state quasi-judicial entity cannot be said to be consistent with a federal law that prohibits the same act, permits treble damages, fees, and costs, and expressly creates a personal cause of action. If *Nationwide, Merchants Home Delivery* and *American Family* are construed to hold otherwise, their lead cannot be followed here.

Ambrose, 891 F. Supp. at 1167. *See also Doe*, 107 F.3d at 1307-08 ("The state of Minnesota has determined that its insurance market can best be regulated by the Commissioner's pursuit of fines and injunctive relief. . . . [T]he extraordinary remedies of RICO would frustrate, and perhaps even supplant, Minnesota's carefully developed scheme of regulation. We do not read the term 'impair' so narrowly as to permit the conclusion that the McCarran-Ferguson Act does not apply in the circumstances presented here."); *Kenty*, 92 F.3d at 392 ("RICO calls for treble damages, which Ohio law does not . . . applying RICO to insurance companies . . . would impair the regulatory framework within which Ohio expects its insurance companies to do business.").

This Court, as demonstrated above, has already supplied principled reasons for reversing the court below. The Ninth Circuit's narrow interpretation of "invalidate,

impair, or supersede" in McCarran cannot be reconciled with Congress' mandate against inadvertent interference by federal law with state insurance regulation, and the principles of federalism that mandate reflects. The Ninth Circuit's reading of McCarran is fundamentally flawed and should be rejected.

CONCLUSION

Amici respectfully urge the Court to reverse the decision below and to hold, in particular, that the "inverse conflict preemption" theory applied by the Ninth Circuit is an erroneous framework for analyzing when a federal law may "invalidate, impair, or supersede" state law within the meaning of the McCarran-Ferguson Act.

Respectfully submitted,

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